Editor's note: Reconsideration denied; clarification granted by Order dated Dec. 30, 1987 -- see 99 IBLA 290A and B below.

CLIFFORD MACKEY ET AL.

IBLA 87-475 Decided October 23, 1987

Appeals from decisions of the Assistant Director, Western Field Operations, Office of Surface Mining Reclamation and Enforcement, declining to take enforcement action in response to citizens' complaints. CC 87-6 and CC 86-28.

Set aside, hearing ordered.

1. Surface Mining Control and Reclamation Act of 1977: Blasting and Use of Explosives: Generally -- Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally

   A decision by the Director, Office of Surface Mining Reclamation and Enforcement, or his delegate, in response to a citizen's complaint alleging that damage to a dwelling has been caused by blasting operations conducted by a surface coal mining operation, declining to take enforcement action pursuant to sec. 521 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271 (1982), is subject to appeal to the Board of Land Appeals. Where such a decision is based on a finding after inspection that the damage was not caused by blasting operations, the decision may be set aside and the case referred to an evidentiary hearing before an administrative law judge pursuant to 43 CFR 4.1286 where the issue of whether the blasting is a causative factor in the damage is a material issue of fact dispositive of the appeal.

APPEARANCES: Richard E. Skawinski, Esq., Tulsa, Oklahoma, for appellants; Stuart A. Sanderson, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; and Caralinn W. Cole, Esq., Tulsa, Oklahoma, for Hickory Coal Corporation.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This case involves two consolidated appeals from decisions of the Assistant Director, Western Field Operations, Office of Surface Mining Reclamation and Enforcement (OSMRE), in response to citizens' complaints filed by homeowners adjacent to surface coal mining operations conducted by Hickory Coal Corporation (formerly Sweetwater Coal Corporation).

Clifford Mackey has appealed from an April 24, 1987, decision issued in response to his citizen's complaint (CC 87-6) concerning blasting activities conducted by the operator. The decision noted that OSMRE's inspection in response to the complaint "included on-site evaluation of blasting methods, review of blasting documents at the mine, analysis of seismic results, and inspection of several homes in the area for blasting damages." The decision stated that the most recent inspection "failed to identify any damage to your home as a result of blasting" and noted that no notice of violation (NOV) was issued to the operator.

Basil Bentley and Josephine Bentley have appealed from a similar decision bearing the same date in response to their citizens' complaint (CC 86-28). The OSMRE decision again concluded no damage to the home caused by blasting was found upon inspection and stated that, hence, no NOV was issued to the operator.

In the notice of appeal filed by Mackey, he asserts that the conclusion that damage to the home was not caused by the blasting is in error. Further, Mackey contends both the State and Federal regulations permit the regulatory authority to reduce blasting levels regardless of the existence of blasting violations or damage to structures in the vicinity caused by the blasting. Mackey also requests an evidentiary hearing pursuant to 43 CFR 4.1286. The notice of appeal filed on behalf of Josephine and Basil Bentley essentially makes the same contentions.

In its answer to appellants' notices of appeal, OSMRE acknowledges that Federal and State regulations allow reduction of blasting levels to prevent damage to dwellings, but asserts that "[b]ecause Oklahoma is the regulatory authority, OSMRE has no independent authority to review the permit and order a reduction in blasting levels through an enforcement action against the operator." OSMRE contends appellants should request that the State regulatory authority lower blasting levels and, if the request is denied, seek timely review of that decision. In answer to the notice of appeal filed on behalf of the Bentleys, OSMRE further states that it had been monitoring the operator's blasting activities since April 1986 in response to the Bentleys' complaints and determined that the operator was performing blasting operations within allowable limits except for an NOV (No. 87-3-6-5) issued February 20, 1987, for violating the terms of its permit by not limiting blasting and not using proper stemming.

By order dated July 2, 1987, this Board deferred a ruling on the hearing motions until receipt of the case files and ordered production of the records. The case files were subsequently submitted to the Board. Counsel for OSMRE has now filed a memorandum in opposition to the request for an evidentiary hearing. As grounds for opposition, OSMRE argues appellants have failed to show the issues of fact which would be considered at a hearing. OSMRE also challenges the propriety of allowing appellants to introduce evidence at a hearing which they failed to tender to OSMRE during its review. In response to OSMRE's opposition to the hearing request, counsel for appellants asserts that OSMRE has refused to consider any "outside" analysis of the damages to the homes. Finally, counsel for OSMRE has replied asserting appellants have withheld information which may be relevant to the citizens' complaints.

OSMRE contends appellants should be barred from tendering such evidence at any hearing or, alternatively, the case should be remanded to OSMRE to consider such additional evidence as appellants provide.

[1] Under section 515(b)(15) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1265(b)(15) (1982), general performance standards applicable to all surface coal mining operations shall require an operation, as a minimum, to ensure that explosives are used only in accordance with existing State and Federal law and the regulations promulgated by the regulatory authority. These regulations must include provisions to "limit the type of explosives and detonating equipment, the size, the timing and frequency of blasts based upon the physical conditions of the site so as to prevent * * * (ii) damage to public and private property outside the permit area." 30 U.S.C. § 1265(b)(15)(C) (1982). 1/ Accordingly, 30 CFR 816.65(a) provides as a general requirement that "[b]lasting shall be conducted to

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1/ "Each applicant for a surface coal mining and reclamation permit shall submit to the regulatory authority as part of the permit application a blasting plan which shall outline the procedures and standards by which the operator will meet the provisions of section 515(b)(15)." 30 U.S.C. § 1257(g) (1982).

This provision was added as an amendment of S. 7 by the Senate with the following explanation:

"* * * [O]ne of the most important features of S. 7 is that it will require strip miners to control their blasting operations in such a manner that there will not be damage outside of the permitted area. Nonetheless, S. 7 does not presently require the strip miner to set out his plans for blasting in his application, and I offer this amendment to add such a requirement. * * *

"The regulatory authority needs to have this type of information at hand in order to insure that there is adequate protection of health, property, and the environment. Only with such information can such potential problems be nipped in the bud.

"Further, a blasting plan will enable the public to gain a fuller understanding of the mining operation at the outset. Without question, the citizens who will be most affected by the mining operations deserve the right to know exactly what those operations will entail.

"* * * I will say that this points to a very critical problem we have in some areas, one being in southern Indiana, where, within a 2.5 mile radius of a particular mine we have had about 89 percent of the homes damaged by blasting. We suggest that at the time the application for the permit is made, a plan specifying how blasting is to be handled to prohibit this kind of damage should be submitted, together with the application."

123 Cong. Rec. 15741 (1977) (Statement of Sen. Bayh).

prevent * * * damage to public or private property outside the permit area," and the comparable Oklahoma Coal Reclamation Regulation, 816.65(h), provides the same. 2/

Section 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3) (1982), provides that when on the basis of a Federal inspection which is carried out during Federal enforcement of a State program in accordance with section 521(b), 3/ an authorized representative of the Secretary determines that any permittee is in violation of any requirement of the Act but the violation does not create an imminent danger to the health or safety of the public or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the representative shall issue a notice to the permittee fixing a reasonable time but not more than ninety days for the abatement of the violation and providing an opportunity for a public hearing. If the authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of the Act or any permit condition required by the Act, and the condition, practice, or

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2/ 30 CFR 816.67(b)(1)(ii) provides that the regulatory authority "shall specify lower maximum airblast levels [than the limits specified in 816.67(b)(1) at any dwelling outside the permit area] for use in the vicinity of a specific blasting operation" if necessary to prevent damage. Oklahoma Coal Reclamation Regulation 816.65(e)(1) provides that airblast shall be controlled so that it does not exceed specified values at any dwelling.

30 CFR 816.67(d)(5) provides that the maximum allowable ground vibration shall be reduced by the regulatory authority beyond the limits established in accordance with 816.67(d)(2), (3), or (4) if determined necessary to provide damage protection. Oklahoma Coal Reclamation Regulation 816.65(i) provides that the Department of Mines may reduce the maximum peak particle velocity allowed if it determines that a lower standard is required because of density of population or land use, age or type of structure, geology or hydrology of the area, frequency of blasts, or other factors.

3/ 30 U.S.C. § 1271(b) (1982) provides:

"Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary, that it will enforce this Act, the Secretary shall enforce, in the manner provided by this Act, any permit condition required under this Act, shall issue new or revised permits in accordance with requirements of this Act, and may issue such notices and orders as are necessary for compliance therewith * * *."

violation does create an imminent danger to the health or safety of the public or cause or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. 30 U.S.C. § 1271(a)(2) (1982). 4/

Oklahoma is a State where OSMRE is responsible for inspecting all surface coal mining operations and issuing notices of violation or cessation orders in accordance with section 521 of the Act. 5/ OSMRE is also responsible for responding to requests for Federal inspections under 30 CFR 842.12. Its decisions on whether to inspect or to take enforcement action in response to such requests are subject to informal review under 30 CFR 842.15(a) and its determinations after this informal review may be appealed to this Board in accordance with 30 CFR 842.15(d). 6/ Thus, our responsibility is to review OSMRE's determinations, based on its inspections of appellants' dwellings, that no violations of the general performance standard to conduct blasting so as to prevent damage to public or private property outside the permit area had occurred. 7/

Critical to resolution of the issue raised by this appeal is the question of whether the blasting was a causative factor in the damage to the dwellings. This is a question of material fact with regard to which even OSMRE's experts have expressed some disagreement. The report of the investigation into the damage to the Mackey residence signed on April 13, 1987, by mining engineers Rosenthal and Hay concluded "it is more likely that the conditions present at the Mackey residence are the result of inadequate design and poor construction techniques rather than * * * past or present blasting operations by the [operator]." On the other hand, a March 23, 1987,

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4/ See 30 CFR 843.11 and 12.

5/ 30 CFR 936.17(d) and (e). See 30 CFR 842.11 and 843.1. After Jan. 1, 1986, the Oklahoma Department of Mines (ODOM) has authority to implement the Oklahoma regulatory program for individual active mines whose permits and reclamation bonds have been reevaluated and revised and found in compliance with the approved program when OSMRE has notified the Department that jurisdiction over the individual permit has been returned to the State. 30 CFR 936.17(c). The record indicates that jurisdiction over this operation has not been returned to Oklahoma.

6/ See Hazel King, 96 IBLA 216, 94 I.D. 89 (1987).

7/ Although authority to issue permits and permit revisions remained with ODOM when OSMRE took over enforcement of the Oklahoma regulatory program (see 49 FR 14686 (Apr. 12, 1984); 50 FR 49378 (Dec. 2, 1985)), we must reject OSMRE's contention that appellants are required to seek a permit revision before ODOM as a prerequisite to seeking enforcement relief from OSMRE for an alleged violation of the Act. In any event, it appears from the record that ODOM responded to a request for reduction in blasting levels by letter of Feb. 24, 1987, noting the existence of a civil suit regarding blasting damages and declining to "impose a temporary or permanent reduction of blasting level on this permit at this time." In such circumstances, it appears further resort to ODOM would be futile.

OSMRE memorandum to the Director, Tulsa Field Office, from the Chief, Technical Assistance Division, noted the conclusion of mining engineer Gronbeck that "the primary cause of damage was due to nearby blasting and the expanding soil pressures were a secondary cause." With respect to the damage to the Bentley residence, mining engineer Rosenthal reached the identical conclusion in his report dated April 13, 1987, as that reached in his investigation of the Mackey home and quoted above. On the other hand, mining engineer Gronbeck's investigation was "inconclusive" regarding the cause of the damage observed, but acknowledged damage may have occurred "as a result of ground shocks from nearby blasting operations."

Where the record discloses the presence of issues of material fact which are dispositive of the legal issues raised by an appeal, the Board has the authority to order an evidentiary hearing before an administrative law judge. 43 CFR 4.1286; E. B. Brooks, Jr., 92 IBLA 282 (1986). While it is not the province of this Department to ascertain liability of the operator for damages to the dwellings at issue, the obligation to determine whether blasting by the operator is causing damage to property off the permit in violation of the Act cannot be ignored.

Hickory Coal Corporation, the operator, has appeared and petitioned to intervene and to be allowed to participate in any hearing ordered. The motion to intervene is allowed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases are referred to the Hearings Division, Office of Hearings and Appeals, for assignment to an administrative law judge. The decision of the administrative law judge shall be final for the Department in the absence of a timely appeal by a party adversely affected.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge

DEC 30 1987

IBLA 87-475	:	Surface Mining
	:	
CLIFFORD MCKEY et al.	:	Petition for
	:	Reconsideration Denied
	:	
	:	Petition for
`	:	Clarification Granted

ORDER

Counsel for the Office of Surface Mining Reclamation and Enforcement (OSMRE) has filed a petition for reconsideration or clarification of our decision in this case cited as Clifford Mackey, 99 IBLA 285 (1987). As grounds for the petition, OSMRE restates its contention raised before the Board in its brief in answer to appellants, Statements of reasons that appellants failed to submit to OSMRE certain expert reports which they obtained concerning the cause of damage to the structures involved. OSMRE repeats its request that the Board bar appellants from tendering any evidence regarding such reports at the hearing ordered by the Board in this case, noting that the Board's decision did not explicitly rule on this issue. Counsel for appellants has not responded to the petition.

With respect to the request for clarification, we note that in issuing our decision in this case we did not intend any ambiguity regarding the scope of the hearing before the administrative law judge. In our opinion, we noted the contention of appellants that OSMRE refused to consider any "outside" analysis of damages to the homes. 99 IBLA at 286. The Board deliberately declined to limit the scope of the hearing before the administrative law judge.

Reconsideration may be granted only in extraordinary circumstances where, in the opinion of the Board, sufficient reason appears therefor. 43 CFR 4.21 c . In our opinion, no reason for reconsideration has been shown.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is denied and the Board's decision is reaffirmed as clarified.

C. Randall Grant, Jr.
Administrative

We concur:

Will A. Irwin
Administrative Judge

R.W. Mullen
Administrative Judge

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